

2877

RECEIVED

2008 APR -1 AM 11:48

EDUCATION OPP. DIVISION  
LIT. SEC.

Civil Rights  
Complaint  
Petition under  
Individuals  
with  
Disabilities  
Education Act  
("IDEA 2004")

March 13

2008

Title IV Civil Rights Complaint Petition to the U.S. Department of Justice, Education Opportunities Section. Federal Statutes protect federally funded public educational institutions. Children are similarly protected to ensure that the public educational facilities they attend are adequate and are appropriately designed. Providing access to students and offering protection from undue hardship. The complaint centers on industrial Lead fume and Sulfur Dioxide mists exposure to students and to the public educational facilities that serve them.

Civil Rights  
Complaint Petition  
against the State of  
Texas, and the  
Texas Commission  
on Environmental  
Quality.

169-76-0

March 13<sup>th</sup>, 2008

U.S. Department of Justice  
Civil Rights Division  
950 Pennsylvania Avenue, N.W.  
Education Opportunities Section, PHB  
Washington, D.C. 20350

**RE: Civil Rights Complaint Petition under Individuals with Disabilities Education Act ("IDEA 2004")**

Via FedEx Express

Dear Attorney General:

I am filing this complaint petition under Title IV of the Civil Rights Act of 1964 and under the Individuals with Disabilities Education Act ("IDEA 2004"), against the State of Texas, Texas Commission on Environmental Quality ("TCEQ"), TCEQ Commissioner's Chairman Buddy Garcia, Larry Soward, Dr. Byran Shaw, and TCEQ Executive Director Glen Shankle. The State of Texas has failed to protect citizens and offer equal protection to individuals covered under "IDEA 2004". TCEQ Chairman Buddy Garcia stated: "I am confident in the decision made today because, like all decisions, it was based on the legal requirements set forth by state and federal statutes. This Commission applies all applicable laws clearly and consistently. Those regulations are in place to be protective of public health and the environment and they are vigorously enforced. I am certain as the Commission moves forward, we will continue to make decisions that are based on the law, common sense and sound science<sup>1</sup>."

Educational establishments enjoy protections offered by many federal statutes and parents are also entitled to similar protections to assure that children who are being deprived by state agencies have access to equal protection of the laws.

Intervention by the Department of Justice is requested to enforce federal statutes. The Attorney General can easily certify that this case is of general public importance and the United States is entitled to the same relief to protect Title IX of the Education Amendments of 1972 and other applicable federal statutes.

"IDEA 2004" Act establishes under § 300.8 Child with a disability (9) *Other health impairment* means having the limited strength, vitality, or alertness, including a heightened alertness to the environmental stimuli, that results in limited alertness with respect to the educational environment, that – (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity

<sup>1</sup> Exhibit 1: TCEQ Press Release: TCEQ Chairman Buddy Garcia on Air Permit # 20345, February 13, 2008

disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and (ii) Adversely affects a child's educational performance<sup>2</sup>.

The "IDEA 2004" rules and regulations under §300.177: States' Sovereign Immunity (a) *General*. A State that accepts funds under this part waives its immunity under the 11<sup>th</sup> amendment to the Constitution of the United States from suit in federal court for a violation of this part. (b) *Remedies*. In a suit against a State for violation of this part, remedies (including remedies both at law and in equity) are available for such a violation in a suit against a public entity other than a State. (c) *Effective date*. Paragraphs (a) and (b) of this section apply with respect to violations that occur in whole or part after the date of enactment of the Education of the Handicapped Act Amendments of 1990. (Authority: 20 U.S.C. 1404)<sup>3</sup>

Operations will produce over 7,000 tons of permitted Air Emissions from the American Smelting and Refining Company, El Paso Smelter (ASARCO). This action exposes school age children to Lead particulates, and Sulfur Dioxide mists. These materials are introduced into the Air, and come into contact with children. Result in adverse health effects, which are known to promote disabilities such as microcytic anemia, lead poisoning and asthma. The El Paso Independent School District (EPISD), Board of Trustees passed a resolution opposing the smelting operations<sup>4</sup>. EPISD's request to Texas Governor Rick Perry fell on deaf ears.

The Texas Commission on Environmental Quality issued a draft order on a decision regarding an air quality application by ASARCO Incorporated (ASARCO) for the renewal of Air Permit No. 20345; TCEQ Docket No. 2004-0049-AIR; SOAH Docket No. 582-05-0593. The TCEQ granted the operating permit to the applicant<sup>5</sup>. The process for this Civil Rights complaint is now appropriate and is timely filled within the required 180-day mandatory period.

It is important at this point that you understand that the primary complaint is not the issuance of the operating air permit. The primary complaint is that educational facilities were not adequately evaluated. Texas State Office of Administrative Hearings (SOAH) heard protestants and permit applicant in a two week trial. SOAH Judges determined that ASARCO failed to prove that its operation would not cause or contribute to air pollution. Special emphasis was prescribed to the air permit applicant to assure that all our area schools and children be provided protection.

TCEQ Executive Director (ED) Mr. Glen Shankle provided and directed which educational facilities ASARCO would be required to model to develop predictive results

<sup>2</sup> Exhibit 2(a): Federal Register Vol. 71, No. 156/Monday, August 14, 2006 /Rules and Regulations pg. 46757

<sup>3</sup> Exhibit 2(b): Federal Register Vol. 71, No. 156/Monday, August 14, 2006/Rules and Regulations pg. 46776

<sup>4</sup> Exhibit 3: EPISD letter and Resolution to TCEQ ED Glen Shankle and Texas Governor Rick Perry, January 24, 2008.

<sup>5</sup> Exhibit 4: TCEQ Fax Transmittal Order Granting Air Permit, February 20, 2008

for air contaminants in the El Paso Air Shed. The ED did not require that ASARCO evaluate Region XIX Headstart school facilities<sup>6</sup>. These schools provide services to children from 0 to 6 years of age. These are critical formative years for children; they are some of the most sensitive population with the greatest risk to develop Lead Blood Poisoning in the region<sup>7</sup>.

This petitioner requested that the ED evaluate how Air is used in the El Paso Schools to determine quantitative & qualitative air pollution values for evaporative air condition equipment servicing the indoor classroom environment. The ED is authorized under Texas Health and Safety Code § 382.034, to undertake any study to conduct and research environmental impacts<sup>8</sup>. The ED capriciously elected to disregard mandated protection<sup>9</sup> to restore and preserve the purity of the state's air under THSC § 382.036. The ED acknowledges that the Air permit application has generated significant public interest<sup>10</sup>.

The Texas State "IDEA 2004" annual state application to the United States Department of Education, Office of Special Education Programs<sup>11</sup>, recently closed to public comments on March 11, 2008.

How is the petitioner affected by the State of Texas? I am a parent who has custody of two children, one of which has increased sensitivity to pollutants resulting in asthma attacks. During the years that ASARCO operated my child experienced long term absences from accessing and participating in school. In one instance an attack occurred during his attendance and participation in the indoor classroom environment. The school absences and asthma attacks decreased substantially after ASARCO shutdown the smelter facility. The ED's failure to evaluate environmental impacts and the issuance of the Texas operating permit 20345 provides me no comfort and causes my wife and me anguish to know that my child is now at a greater risk of becoming another casualty and a mortality statistic common to asthma suffers.

ASARCO argues "We are astounded that EPISD is taking a position against more than 1,800 well paying jobs with full benefits considering that recent reports show that the rate of El Paso County's children living in poverty is growing and poverty is correlated to poor learning<sup>12</sup>."

The Department of Justice, AG is encouraged to find a determination that person(s) are unable to bear the expense of bringing suit and obtaining effective legal representation against the unlimited resources of the State of Texas. The "IDEA 2004" Act appears to prohibit an equity solution against a State. The petition would be

<sup>6</sup> Exhibit 5: El Paso GTLO Community Report, p. 10, June 2007

<sup>7</sup> Ibid. p. 11.

<sup>8</sup> Ibid. p. 7.

<sup>9</sup> Exhibit 6: TCEQ ED response to comments on ED report to the Commission, Response # 4, July 27, 2007

<sup>10</sup> Ibid p. 1.

<sup>11</sup> Exhibit 7: Texas Education Agency - IDEA 2004, State application OMB NO. 1820-0030 Expires 08/31/2009, <http://www.tea.state.tx.us/special.ed/stplan/stapp.doc>

<sup>12</sup> Exhibit 8: KVIA TV Press Release, ASARCO Response to EPISD resolution, January 25, 2008

meritorious in that a resolution could provide responsive protection to the welfare of the general public and Individuals with Disabilities as recognized by the Act.

The TCEQ has not promulgated regulatory standards by which to evaluate these types of Air environmental health impacts. It is apparent to this petitioner that the response provided by the TCEQ, lacks understanding and a capacity to address concerns. Failure to research and investigate has caused a deprivation of my children's civil rights, and others similarly enjoined requiring protections guaranteed under law.

Respectfully submitted,

I hereby certify that the statements above are true and correct to the best of my knowledge.

